Brown, J., giving his ruling, said: — This line of questions is plainly leading up to an application by Mr. Smith to treat his witness as hostile and to be allowed to cross-examine him. I have no doubt that these questions were allowed to go on too long without the application being made; and that they have been in the nature of cross-examination, no application having yet been made and no leave having yet been granted. And I confess that I was at one time of the opinion that the application, when it was made, would have to be refused.

By section 22 of the Common Law Procedure Act 1854 where a witness, *in the opinion of the Judge,* is adverse to the party calling him that party may, *with leave of the Judge,* put to him statements which he has previously made which are inconsistent with his present testimony. Under that section it is, therefore, a pre-requisite that the witness must, in the opinion of the Judge, be "adverse." A witness is considered to be adverse if, by his demeanour or by his manner of answering questions, he shows that he is hostile in mind to the party calling him, and is not desirous of telling the Court the truth. This witness has given no ground at all for considering that he is "adverse;" and if the English section applied here, I should be bound to refuse the application when it is made.

But by section 155 of our Evidence Ordinance the Court's discretion is not fettered by any such limitation as is imposed by section 22 of the Common Law Procedure Act. It has been brought to my notice (though not, in my opinion, in the way it should have been) that this witness, in giving evidence on a previous occasion, made a statement on a material matter which conflicts with his present testimony. If that proves to be the case, by our law I have an unfettered discretion to allow Mr. Smith to cross-examine him on it.

When a witness has given an answer or answers, which the party calling him knows to be in conflict with some statement or evidence which he has previously made or given, the proper procedure, in my opinion, is for Counsel then to ask him (as was done in this case) whether he made a statement (or gave evidence) at a certain place on a certain date. Having heard his answer (whatever it may be) no further questions should be put at that stage. But Counsel should then hand to the Judge the statement (or record of the evidence), and apply for leave to cross-examine him under the provisions of section 155 of the Evidence Ordinance. The Judge, having given the other side an opportunity of seeing the document and making his submissions on the application, will then give his ruling. That, in my view, is the proper procedure, in a situation of this kind.

I now ask Mr. Smith to hand up the record of the evidence which the witness gave in the Police Court.

SAW THEAN TEIK v. REGINA.

[A. Cr. J. (Spenser Wilkinson, J.) December 15, 1952]

[Penang — Criminal Appeal No. 47 of 1952]

Road Traffic — Motor Vehicles (Driving Offences) Proclamation — Dangerous driving — Evidence of intoxication — Wrongful admission of reports — Criminal Procedure Code (Cap. 21), s. 427.

This was an appeal against the conviction of the appellant for dangerous driving. At the trial, the reports of a Medical Officer and of the Senior Government Chemist were put in evidence, although the Medical Officer and the Senior Government Chemist were called as witnesses.

Held: (1) it is wrong for a witness in a criminal case to produce a report as a substitute for oral evidence; (2) when a witness whose report is admissible under the Criminal Procedure Code is called to give oral evidence his report should only be used, if at all, to refresh his memory or corroborate the oral evidence; (3) in a summary trial no inference can be drawn from a failure to cross-examine witnesses offered for cross-examination only.

Semble: evidence of intoxication may well be admissible upon a charge of dangerous driving notwithstanding its prejudicial nature, if it was relevant to an issue before the court.

Cases referred to:—

(1) *Tan Siong Kok v. R.* (1952) M.L.J. 137; (1952), 3 M.L.R. 32.

(2) *Kamaruddin bin Omar v. Public Prosecutor* (1938) M.L.J. 63.

(3) *Girdari Lall & Ors. v. Public Prosecutor* (1946) M.L.J. 87.

CRIMINAL APPEAL.

Eusoffe Abdoolcader for the appellant.

C. M. Sheridan (Federal Counsel) for the respondent.

Cur. Adv. Vult.

Spenser Wilkinson, J.: — The appellant was convicted on a charge of dangerous driving under section 4 of the Motor Vehicles (Driving Offences) Proclamation (improperly described in the Charge as G.N. 151/51) and was fined $100 and his driving licence endorsed.

The Charge arose out of a collision between the appellant's car and that of the Complainant Rozells on the night of the 20th/21st January, 1952 soon after midnight in Burmah Road at a time when it was drizzling and the road was wet. The gist of the Complainant's story was that as the appellant's car approached his it swerved first to its right or off-side

and then back to its left and then in spite of the Complainant's attempt to avoid accident by himself swerving to the right hit his car along its near side.

One of the passengers who sat in the front of the Complainant's car gave evidence that he saw the appellant's car approaching slightly on its wrong side. He made no mention of any swerving by the appellant's car, although he said that he was watching the road all the time, because it was raining and that he had told the Complainant to be careful. Two other passengers in the Complainant's car who were sitting in the back seat were not called as witnesses for the prosecution but were offered for cross-examination, which was declined.

The version of the accident given by the appellant is not very clear. He says he was driving slightly on his own side of the road and the Complainant's car was being driven to some extent on its wrong side. He states that at the last minute he swerved to the right to avoid a collision.

In addition to the above evidence of the actual collision the prosecution called a Medical Officer and a Chemist to give evidence that at the time of the accident the appellant was under the influence of alcohol.

One of the main grounds of appeal was that this evidence of intoxication should not have been admitted upon a charge of dangerous driving. On this point Counsel for the appellant relied upon the dictum of Murray-Aynsley, C.J., on this subject in the recent case of *Tan Siong Kok v. Regina*[1] where he said :—

"The question was raised at the hearing as to the propriety of introducing evidence, in these cases, showing that the person charged has consumed alcohol at some time before the accident. In view of the prejudice that can be caused by this kind of evidence I think that this should not be done unless there is serious grounds for supposing that the conduct of the person accused has been substantially affected thereby."

He also relied upon the headnote in the report in the Malayan Law Journal of *Kamaruddin bin Omar v. Public Prosecutor*[2]. That headnote reads as follows :—

"Where a person is charged with causing death by a rash act not amounting to culpable homicide, the fact that he was intoxicated at the time of the accident is irrelevant to the issue and ought not to be adduced in evidence. He may, however, be charged with being intoxicated while in charge of a motor vehicle and such evidence will become admissible."

In my opinion this headnote is misleading and does not set out correctly the result of the decision in the case. The first sentence does no more than summarise certain *dicta* contained in the judgment which are clearly *obiter*. The following passages from the judgment which refer to a previous trial which was not then before the appellate Court appear to be the basis of the sentence of the headnote :—

"In the previous proceedings the question of intoxication was not in issue and was never considered.

"This question of liquor had quite properly been kept out of that trial entirely. Its introduction would only have served to obscure the real issue and would certainly have tended to be prejudicial to the Appellant."

In this part of the judgment the learned Judge was considering the argument based on *res judicata* and the question of the admissibility or otherwise of evidence of intoxication upon a charge under section 304A of the Penal Code was not in any way before him, so that this case cannot possibly be regarded as an authority on this very difficult question.

Notwithstanding the *dicta* quoted from the above two cases I am inclined to think that evidence of intoxication, short of an offence under section 5 of the Proclamation, may well be admissible upon a charge of dangerous driving, notwithstanding its prejudicial nature, if it is relevant to an issue before the Court and it may well be so relevant under section 7, 8(2) or 14 of the Evidence Ordinance. I do not think it is necessary, however, to decide this point, because much particular evidence of intoxication tendered in this case was in my view inadmissible for other reasons. In the first place the Medical Officer having been called as a witness his report should not have been put in. I think it is quite clear from the wording of section 427 of the Criminal Procedure Code that under that section a Medical Officer's report is admissible only if that Officer is not called as a witness. When a Medical Officer is giving oral evidence then of course any notes which he may have made at the time of his examination he can refer to refresh his memory. Moreover, if his report is made at about the time when his examination took place the report could be put in not as primary evidence of its contents but to corroborate the oral evidence already given under section 157 of the Evidence Ordinance. In the present case, however, the report of the Medical Officer was not made until the 7th July, 1952, although his examination of the appellant took place on the 21st January, 1952, over five months earlier. I am, therefore, of the opinion that in this case the report was not admissible either under the Criminal Procedure Code or under the Evidence Ordinance. In any event a report made so long after the event could not be of any great evidential value. The doctor's report was very much stronger than the report of the Chemist and it is impossible to know what his evidence would have been had he depended entirely upon his recollection assisted by any notes he may have made at the time.

The report of the Senior Government Chemist which was put in was also in my view inadmissible for the reason that he was called as a witness and no notice was given under section 427 of the Criminal Procedure Code of the prosecution's intention to use the report. I do not atttach much importance to this point, because I have no doubt that if he had been properly examined his evidence would have been identical with the contents of his report. Technically, however, it is wrong for a witness in a criminal case to produce a report as a substitute for oral evidence. Clearly, if the witness is in the witness box the best evidence is his oral evidence as to what he saw or discovered (see section 60 of the Evidence Ordinance). Where witnesses of this kind are brought to Court their reports should only be used, if at all, either to refresh memory or as corroboration.

Another ground of appeal related to the two passengers in the Complainant's car who were offered for cross-examination and not cross-examined. In his Grounds of Decision one of the reasons given by the learned Magistrate for believing the Complainant's evidence was as follows :—

"Rozells gave evidence that he was carrying 5 passengers, Prosecution Witness No. 7 Chin Boon Chew and Lim Hoon Ling in his car. Chin Boon Chew and Lim Hoon Ling were offered by the prosecution for cross-examination. As they were not cross-examined by the Defence, I presumed that their evidence would be unfavourable to Defendant."

Whilst it might be possible in the High Court, after a Preliminary Enquiry, to draw some inference from the failure of the accused to cross-examine a witness whose deposition contained evidence against him I do not think it is possible to draw any such inference in a summary trial. It seems to me that no inference can be drawn from Counsel's failure to cross-examine a witness who has given no evidence and whose statement he has never seen. The learned Deputy Public Prosecutor conceded that the learned Magistrate should not have drawn any such inference in the present case.

One of the authorities cited by Counsel for the appellant in support of this appeal was *Girdari Lall & Ors. v. Public Prosecutor*[3]. That was a robbery case in which a photograph of the accused mounted on a card which was obviously part of a Police record was put in evidence and it was held that this was prejudicial to the accused. In the judgment of the Court this passage appears :—

"The production of the photograph in the present case would be apt to prejudice a jury and to embarrass a Judge, and where evidence pro and con of robbery is fairly evenly balanced, may easily have the effect of tipping the scale."

I feel that in the present case, where there was at least a slight conflict of evidence between the Complainant and his passenger, and the evidence pro and con of negligence amounting to an offence appears to have fairly evenly balanced, the admission of the inadmissible report of the doctor as to intoxication and the improper inference drawn that the other two passengers would have given evidence unfavourable to the accused may well have tipped the scale against the appellant in the mind of the learned Magistrate.

For these reasons I do not think that the conviction should stand and I quash it accordingly.

Conviction quashed.

ARIFFIN BIN CASSIM JAYNE v. PUBLIC PROSECUTOR.

[A. Cr. J. (Thomson, J.) April 30, 1953]

[Ipoh — Criminal Appeal No. 4 of 1953]

Criminal Procedure Code (Cap. 6), s. 316 — Plea of autrefois acquit — Effect of setting aside conviction of lower Court.

This was an appeal against the conviction of the appellant on a retrial on a charge of criminal breach of trust. The principal ground of appeal was that the appellant was entitled to the benefit of the plea of **autrefois acquit** on the ground that his original conviction had been set aside.

Held: where an appellate Court in an appeal from a conviction reverses the conviction it should either acquit or discharge the accused or it should order a retrial by a competent Court and if it fails to follow either of these courses and if there is no question of the trial in the Court a **quo** being a nullity, then the order setting aside the conviction must be held to be an acquittal.

[**Editorial Note:** — In **Public Prosecutor v. Suppiah Pather** (Penang Criminal Revision No. 14 of 1951 unreported) Spenser Wilkinson, J. said that it has frequently been reiterated that unless there is some very good ground to the contrary the discharge of an accused person should amount to an acquittal. In this connection his Lordship referred to the following decisions: (1) **Public Prosecutor v. Mat Zain bin Yahya** digested in (1949) M.L.J. 148; (2) **Goh Oon Keow & anor. v. Rex** (1949) M.L.J. 35 and (3) **Seet Ah Ann v. Public Prosecutor** (1950) M.L.J. 293.

His Lordship varying the Magistrate's Order by directing that the discharge in his case amounted to an acquittal concluded:—

"If the prosecution are not ready to proceed with their case after reasonable adjournments have been granted, an accused person should not be allowed to suffer from the dilatoriness of the prosecution by being left with a charge hanging over his head indefinitely.

"Where the prosecution are unable to proceed for the time being owing to the difficulty of obtaining a witness or for some other cause and are able to satisfy the Court that they will proceed with the prosecution within a reasonable time, then there would be good grounds for a discharge not amounting to an acquittal. In this case, however, although counsel apparently only asked for a discharge not amounting to an acquittal I think the proper order would have been a discharge amounting to an acquittal."]